NO. 92-701

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In the Supreme Court of the United States

OCTOBER TERM, 1992

ESTHER PRINCE
PETITIONER

VS.

HOFFMAN-LA ROCHE, INC.
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WM. ROBERTS WILSON, JR.
WM. ROBERTS WILSON, JR., P.A.
654 NORTH STATE STREET
JACKSON, MISSISSIPPI 39202
(601) 948-1111
COUNSEL OF RECORD

OF COUNSEL:
MITCHELL H. TYNER
RONALD C. MORTON
WM. ROBERTS WILSON, JR., P.A.
654 NORTH STATE STREET
JACKSON, MISSISSIPPI 39202
(601) 948-1111

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Fifth Circuit deny the Petitioner her right to due process of law protected under the Fourteenth Amendment of the United States Constitution when it failed to follow the law of Mississippi as declared by the Mississippi Supreme Court, and ruled instead that foreign plaintiffs could not use the "doing business" prong of Mississippi's Long Arm Statute to sue foreign, non-registered defendants in Mississippi.

2. Whether the United States Court of Appeals for the Fifth Circuit erred in its refusal to certify to the Mississippi Supreme Court, the issue of "Whether a foreign plaintiff can utilize the 'doing business' prong of Mississippi's Long Arm Statute to sue foreign, non-registered defendants in Mississippi Courts."

3. Whether the United States Court of Appeals for the Fifth Circuit abused its discretion in its refusal to consider a lower Mississippi State Court's holding as to the proper application of the "doing business" prong of Mississippi's Long Arm Statute, thus violating the Petitioner's rights of due process under the Fourteenth Amendment to the United States Constitution.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Esther Prince and the Respondents Hoffman-La Roche, Inc. The Honorable Lee Davis Thames, J. Carter Thompson, Jr., and William M. Gage, served as attorneys for Hoffman-La Roche, Inc.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ESTHER PRINCE
PETITIONER

VS.

HOFFMAN-LA ROCHE, INC.
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Esther Prince, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above and titled proceeding on May 28, 1992, and reaffirmed by its denial of Petition for Rehearing on July 21, 1992.

OPINIONS AND DENIAL OF PETITION FOR REHEARING BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not reported but is reprinted in the Appendix hereto, P. A-13, *infra*. The Court of Appeals' denial of Petition for Rehearing is represented in the Appendix hereto, P. A-17, *infra*.

The memorandum decision of the United States District Court for the Southern District of Mississippi is reported at 780 F. Supp. 417 (S.D. Miss. 1992). It is reprinted in the Appendix hereto, P. A-1, *infra*. The memorandum decision of the United States District Court for the Southern District of Mississippi denying Petitioners' Motion for Reconsideration has not been reported. It is reprinted in the Appendix hereto, P. A-10, *infra*.

JURISDICTION

Invoking federal diversity jurisdiction under 28 U.S.C. § 1332, the Petitioner brought this suit in the Southern District of Mississippi. On December 31, 1991, a Rule 54(b) Final Judgment was entered in favor of Respondent Hoffman-La Roche, Inc., by the District Court. Appeal was made as of right under 28 U.S.C. §§ 1291, 1332, and Fed. R. App. P. 4. On Respondents' appeal, the Fifth Circuit, on May 28, 1992, affirmed the District Court's decision. A timely Petition for Rehearing was filed, and on July 21, 1992, the Petition for Rehearing was denied.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

Miss. Code Ann. § 13-3-57 (Supp. 1990). Service when Defendant is nonresident doing business in state; appointment of Secretary of State as agent.

Any nonresident person, firm, general or limited partnership, or any foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a

resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act be deemed equivalent to the appointment by such nonresident of the secretary of state of the State of Mississippi, or his successor or successors in office, to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceedings accrued or accruing from such act or acts or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their or its agent, servant or employee...

Miss. Code Ann. § 79-1-27 (repealed effective January 1, 1988).

Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not...

STATEMENT OF THE CASE

On April 19, 1991, Petitioner, Esther Prince, filed in United States District Court for the Southern District of Mississippi, Southern Division, a complaint againt Respondent, Hoffman-La Roche, Inc., a drug manufacturer, to recover from injuries caused by Respondent's defective chemical product, Fansidar. Specifically alleged as grounds for recovery were breach of express warranty, breach of implied warranty, and strict liability. This claim arose from Esther Prince's purchase and ingestion of the Respond-

ent's drug, Fansidar, between October 1984 and September 1985. As a direct and proximate result of Roche's defective product, Prince suffered cirrhosis of the liver, and was severely and permanently incapacitated and disabled. Esther Prince has had to undergo multiple liver transplants and incurred monumental medical expenses for this treatment. Prince, a Pennsylvania resident, sought relief against Respondent, Hoffman-La Roche, Inc., in the State of Mississippi where Roche was and is engaged in substantial and continuous business transactions.

Specifically, Prince utilized Mississippi's Long Arm Statute, Miss. Code Ann. § 13-3-57 and Mississippi's Foreign Corporations Statute, Miss. Code Ann. § 79-1-27, in order to effect jurisdiction over the Respondent. On July 26, 1991, Roche moved for dismissal of the cause, arguing that the "doing business" prong of Miss. Code Ann. § 13-3-57, and Mississippi's Foreign Corporations Statute, Miss. Code Ann. § 79-1-27, could not be utilized by an out of state plaintiff to perfect jurisdiction over a foreign defendant. On September 27, 1991, Roche's Motion to Dismiss was granted. On October 10, 1991, Prince filed a Motion to Reconsider, which was denied by the Court on December 26, 1991. On December 31, 1991, a Rule 54(b) Final Judgment was rendered against Appellant, Prince, and on January 23, 1992, Prince filed her motion to Appeal before the United States Court of Appeals for the Fifth Circuit. On May 28, 1992, the Fifth Circuit affirmed the District Court's ruling. Petitioner timely filed with the Fifth Circuit, a Petition for Rehearing, and a Suggestion for Rehearing En Banc, both of which were denied on July 21, 1992. Petitioner now seeks a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, as sensitive review would appear to require that this Court correct Fifth Circuit's erroneous application of Mississippi law.

REASONS FOR GRANTING THE WRIT

1. Despite the fact that the Mississippi Supreme Court's opinion in *Shewbrooks v. AC&S, Inc.*, is dispositive of the issue of interpreting the Mississippi Long Arm Statute, presented before the United States Court of Appeals for the Fifth Circuit, the Circuit Court refused to acknowledge or follow *Shewbrooks*.

In a 1988 landmark jurisdictional decision, the Mississippi Supreme Court ruled in *Shewbrooks v. AC&S*, 529 So. 2d 557 (Miss. 1988) that an out of state plaintiff is free to utilize the "doing business" prong of Mississippi's Long Arm Statute, Miss. Code. Ann. § 13-3-57, when suing an out of state defendant in a Mississippi forum. In *Shewbrooks*, a Delaware resident was permitted to recover in a Mississippi forum, from eighteen out of state defendants, seven of which were not registered to do business in the State of Mississippi. *Id.* at 569 (Robertson, J., dissenting). There was no evidence that the *Shewbrooks* plaintiffs had ever set foot in Mississippi. *Id.* at 574 (Anderson, J., dissenting). The suit was brought in Mississippi because the statute of limitation against the defendants had run in the plaintiffs home state of Delaware. The Mississippi Trial Court dismissed the defendants for lack of personal jurisdiction and *forum non convenes*. However, in a *en banc* decision, the Mississippi Supreme Court reversed the trial court's decision and summarily dispensed with the fallacy that an out of state plaintiff cannot utilize Mississippi's Long Arm jurisdictional statute.

> There is no serious contention on appeal that the Circuit Court lacked personal jurisdiction of the defendants, all of which do business in Mississippi and are subject to process in this state. This ground of dismissal needs little discussion.

> The fact that a plaintiff and a defendant are nonresidents of a state in a transitory cause of action which accrued in another state does not, in and of itself, deprive a court of lawful authority (i.e. "jurisdiction") to hear the case, and this is universally recognized by all courts.

Id. at 559.

The Mississippi Supreme Court then stated in unequivocal terms that Mississippi's Long Arm Statute reaches foreign, nonregistered defendants:

> The only restriction placed on states in hearing out of state claims is the constitutional limit placed on our long arm statute. So long as an out of state litigant has enough minimum contacts in Mississippi so that the maintenance of a suit "does not offend the taditional notions of fair play and substantial justice," our court have the power to hear a suit. So long as the case falls within the prescribed period of when a suit can be brought, our courts must hear the action.

Id. at 565 (citations omitted). Despite the fact that the plaintiffs were residents of Delaware and had never set foot in Mississippi, the Mississippi Supreme Court held that these plaintiffs were lawfully able to utilize Mississippi's Long Arm jurisdictional statute to reach foreign, nonregistered defendants.

Prior to the *Shewbrooks* decision, numerous Federal Court decisions held that an out of state plaintiff could not utilize the "doing business" prong of Miss. Code Ann. § 13-3-57 to reach foreign defendants. *See e.g. Smith v. Dewalt Products Corp.*, 743 F.2d 277, 279 (5th Cir. 1984); *Golden v. Cox Furniture Manufacturing Co. Inc.*, 683 F.2d

115, 117 (5th Cir. 1982); *Breland v. Hideaway Lake, Inc.*, 585 F.2d 716, 719-21 (5th Cir. 1978). These Federal Court rulings were perfectly permissible, as pre-*Shewbrooks, Erie* "guesses" as to what the Mississippi Supreme Court would do given the opportunity to rule upon this jurisdictonal issue. *See Commissioner of Internal Revenue v. Estate of Bosh*, 387 U.S. 456 (1967).

After the Mississippi Supreme Court's ruling in *Shewbrooks v. AC&S* however, Mississippi's Federal Courts no longer had the luxury of "guessing" as to how Mississippi would decide the issue. The issue had been decided, and *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938) and its progeny commands that Mississippi's Federal judiciary follow the Mississippi Supreme Court's interpretation of Mississippi's law. This the Mississippi Federal Courts, and the Fifth Circuit, have failed to do. *See e.g. Herrley v. Volkswagen*, 957 F.2d 216 (5th Cir. 1992); *Mills v. Dieco, Inc.*, 722 F. Supp 296 (N.D. Miss. 1989).

The Fifth Circuit and Mississippi Federal Courts' refusal enlarge the jurisdictional application of § 13-3-57 is based upon a belief that, had the Mississippi Supreme Court truly intended to apply the "doing buiness" prong of § 13-3-57 the court would have explicitly stated that it was overruling the long federal precedent to the contrary.

> The plaintiffs content that the case of *Shewbrooks v. AC&S, Inc.* opened the Mississippi Long Arm Statute's "doing business" provision to nonresident plaintiffs and dissolved the statute's nexus requirement. While their argument in innovative, the Court declines to adopt their interpretation of the *Shewbrooks* decision.

> The *Shewbrooks,* nonresident plaintiffs filed suit in Mississippi against foreign corporations for a cause of action which occurred outside Mississippi. The court held that personal jurisdiction existed over the defendants; however, the opinion does not disclose the basis on which personal jurisdiction was obtained. The *Shewbrooks* opinion expressly states only that nonresident parties and a cause of action which occurs out of the state are not factors which, in and of themselves, "deprive a court of lawful authority to hear [a] case." Apparently, in *Shewbrooks* the long arm statute was not used to obtain personal jurisdiction. The statute was not cited and cases construing the "doing business" provision also were conspicuously absent. Indeed, the court noted there was "no serious question on appeal" that personal jurisdiction existed over the defendants. Based on the foregoing factors, the court does not consider *Shewbrooks* a personal jurisdiction case which invalidates well established state and federal precedent and construes the long arm statute contrary to its plain meaning.

Mills, 722 F. Supp. at 296 (citations omitted).

However, there were only two methods of obtaining jurisdiction available to the *Shewbrooks* plaintiffs: the doing business prong of Miss. Code Ann. § 13-3-57, and the Mississippi Foreign Corporations Statute, § 79-1-27. Regardless of which of these statutes the *Shewbrooks* court used in exercising jurisdiction over the foreign defendants, the effect of the *Shewbrooks* opinion was to open both statutes to use by nonresident plaintiffs. Both §§ 13-3-57 and 79-1-27 must be read in "harmony." *Arrow Food Distributors v. Love,* 361 So. 2d 324 (Miss. 1978). Even if the Mississippi Federal Courts were correct, and *Shewbrooks* did not apply § 13-3-57, the ultimate result of

the *Shewbrooks* decision was still to make § 13-3-57 available to use by out of state plaintiffs. Sections 13-3-57 and 79-1-27 "must be construed together and harmonized together." *Smith v. Dewalt Products Corp.*, 743 F.2d 722 (5th Cir. 1984). Therefore, if a nonresident plaintiff was precluded from using one, i.e. § 13-3-57, he was likewise precluded from using the other, i.e. § 79-1-27. *Id.* Following the court's logic in *Smith*, one must also say that these two statutes must remain in harmony. To say that *Shewbrooks* permitted a nonresident plaintiff to sue an out of state defendant under § 79-1-27, then it logically follows that the same door must be opened to nonresident plaintiffs utilizing the doing business prong of § 13-3-57. If a nonresident plaintiff can utilize § 79-1-27, then that same nonresident plaintiff can also utilize § 13-3-57; to hold otherwise would be to create disharmony between the statutes. *See Smith v. Dewalt Products.* 743 F.2d 722.

Additionally, even though § 79-1-27 was repealed by the Mississippi Legislature effective 1988, the very terms of this jurisdictional statute remain applicable to the instant case. Ms. Prince's cause of action accrued prior to the repeal of § 79-1-27, and as such the provisions of this statute remain in full force and effect as to her claim. Under the Mississippi Code, changes in a statute do not operate to change any rights which have previously accrued. Likewise, new statutes are construed as having only a prospective, and not a retroactive effect, unless the purpose and intention of the legislature is clearly expressed to give a retroactive operation. Miss. Code Ann. § 1-1-21 (1972).

Under the Mississippi Code, any right which accrued prior to 1988 would be governed by the Miss. Code Ann. § 79-1-27. Section 1-1-21 clearly manifests an intent on the part of the Mississippi legislature to apply amendments, repeals, and changes in the code *prospectively* rather than

retroactively.

Commentators on this issue likewise agree that retroactive operation of statutes is not favored by courts, and laws will not be construed as retroactive unless the legislature intended such an application. Singer, *Statutes and Statutory Construction*, Vol. 2, pp. 348-49; *see also Mladinich v. Kohn*, 185 So. 2d 481 (Miss. 1966).

Both the District Court, and the Fifth Circuit Court of Appeals, totally ignored the Petitioner's attempt to exercise her jurisdictional rights under § 79-1-27. The courts further failed to give any attention whatsoever to Petitioner's argument that § 79-1-27 and § 13-3-57 must remain in harmony, in light of the *Shewbrooks* decision.

Thus, the Fifth Circuit in its failure to address these arguments, has created discord between application of jurisdictional statutes in Mississippi's State Courts, and application of these same statutes in Mississippi's Federal Courts. Two separate lines of law presently seem to exist in Mississippi, which will encourage forum shopping between the Federal and State judiciaries. Plenary consideration of the matter by this Court is essential.

II. The United States Court of Appeals for the Fifth Circuit did not remain faithful to its self-imposed standards of review in refusing to certify the jurisdiction question to the Mississippi Supreme Court, or alternatively to defer to the holding of a lower Mississippi State Court considering the same issue.

The Mississippi Supreme Court has provided a means whereby Federal Courts, when deciding dispositive questions or propositions of Mississippi Law on which there are no clear controlling Mississippi precedents, may

certify such questions or propositions of law to the Mississippi Supreme Court. Miss. S. Ct. R. 20. The Fifth Circuit Court of Appeals has, on many occasions, taken advantage of such certified question rules - a course of action which has been enthusiastically endorsed by this Honorable Court. *See e.g. Lehman v. Schein,* 416 U.S. 386 (1974); *Exxon Company U.S.A. v. Banque de Paris,* 874 F.2d 235 (5th Cir. 1989); *Manookian v. A.H. Robins Company,* 760 F.2d 567 (5th Cir. 1985). In fact, the Fifth Circuit Court of Appeals in *Manookian v. A.H. Robins Company* certified to the Mississippi Supreme Court, the exact issue raised in the instant case; that is, whether a foreign plaintiff can utilize Mississippi's jurisdictional statutes to reach foreign nonresident defendants. The Mississippi Supreme Court was unable to answer the question when it was certified in *Manookian,* due to a stay imposed by a U.S. Bankruptcy Court during the entire time that certification was pending.[1]

In deciding to certify cases to state Supreme Courts, the Fifth Circuit has applied a two tier analysis, neither tier of which was applied in the instant case. The Fifth Circuit has stated that it will consider: (1) the absence of sufficiently clear precedence and the danger of pronouncing the result that the state Supreme Court would later not follow; and (2) whether the issue was "important and unsettled." *Deshotels v. SHRM Catering Service, Inc.,* 842 F.2d 116, 119 (5th Cir. 1988); *Puckett v. Rufenacht, Vromagen & Hertz, Inc.,* 919 F.2d 992, 993 (5th Cir. 1990) (*Puckett v. Rufenacht, Vromagen & Hertz Inc.,* 903 F.2d 1014, 1021 (5th Cir. 1990); *Pacific Lining Co. v. Algenon Blair Construction Co.,* 812 F.2d 237, 242 (5th Cir. 1987)).

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[1] The *Manookian* case was subsequently settled with the bankruptcy trustee pior to the stay being lifted, and thus the Mississippi Supreme Court was ousted of jurisdiction over the question certified to it.

Rather than apply its self-imposed standards to determine whether the question presented in the instant case is one properly to be certified to the Mississippi Supreme Court, the Fifth Circuit Court of Appeals instead simply refused to even consider certifying the question, stating only "we decline to [certify this question to the Mississippi Supreme Court] because of the well established line of federal authority answering the question at hand." P. A-14, *infra*. Although the Petitoner has never denied that a long line of federal authority exists ruling *contra* to Petitioner's position on this jurisdictional issue, erroneous federal authority is irrelevant to the issue of certifying questions to the Mississippi Supreme Court. In deciding to certify questions, the Fifth Circuit has held that the proper considerations are the absence or ambiguity of state authority, not federal authority. *Deshotels*, 842 F. 2d 116; *Puckett*, 919 F.2d 992; *Pacific Lining Co.*, 812 F. 2d 237. The Fifth Circuit's refusal to certify because of the "well established line of federal authority answering the question at hand" was in fact contrary to this Court's mandate in *Erie* and its progeny.

Additionally, the very issues raised before the Fifth Circuit Court of Appeals in this case have been taken under submission by one of the Circuit Courts of the State of Mississippi, and will undoubtedly, unless settled, be decided by the Supreme Court of Mississippi. The results of these decisions will be available to Esther Prince, so long as this case is not disposed of. The pending case of *Alexis v. AC&S, Inc.*, Cause No. 91-69-404, Circuit Court of Hinds County, was brought to the Fifth Circuit's attention, and a request was made that the Fifth Circuit stay Ms. Prince's case pending the outcome of *Alexis*. Since filing her Petition for Rehearing, an additional case dealing with these precise issues, *Southern Pacific Transportation Co. v. Dudley Wayne Fox*, is likewise now pending before the

Supreme Court of the State of Mississippi as a Petition for Rehearing. Deference to these Mississippi State Courts opinions is all together proper, and under this Honorable Court's guidance in *Fidelity Trust Co. v. Field*, 311 U.S. 167 (1940), it is meet, right, and perhaps the bounded duty of the Fifth Circuit, at a bare minimum, to consider the holding of the highest court in Mississippi on an interpretation of state law, even when that highest court is not the state's Supreme Court. *See also King v. United Commercial Travelers*, 333 U.S. 160 (1947); *Lamarque v. Massachusetts Indemnity Life Insurance Co.*, 794 F.2d 194, 196 (5th Cir. 1986); *Sea First Commercial Corp. v. United States Fidelity and Guaranty Co.*, 780 F.2d 1290, 1295 (5th Cir. 1986); *Jackson v. Johns Manville Sales Corp.*, 781 F.2d 394, 397 (5th Cir. 1986).

In light of the fact that both the Mississippi Supreme Court, and the Circuit Court for the First Judicial District of Hinds County, Mississippi, are presently considering, and will likely render an intervening decision on this very narrow and precise issue, the Fifth Circuit Court of Appeals should properly have granted Prince's Petition for Reconsideration and at a bare minimum, held Petitioner's case in abeyance until one of the Mississippi State Courts had rendered its opinion. The Fifth Circuit's failure to do so has tended to greatly increase the likelihood of disharmony between federal and state courts' application of state law, thus encouraging forum shopping between state and federal courts. Accordingly, consideration of the matter by this Court is necessary.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted. Despite the Mississippi Supreme Court's clear ruling that foreign plaintiffs can sue foreign defendants doing business in the State of Mississippi, pursuant to Mississippi law, the Fifth Circuit Court of Appeals has totally disregarded Mississippi's pronouncement of Mississippi law, and instead continued to apply pre-*Shewbrooks, Erie* "guesses" as to what Mississippi law should be. Plenary consideration of the matter by this court is thus essential.

RESPECTFULLY SUBMITTED,

WM. ROBERTS WILSON, JR.
WM. ROBERTS WILSON, JR., P.A.
654 NORTH STATE STREET
JACKSON, MISSISSIPPI 39202
(601) 948-1111

COUNSEL OF RECORD

OF COUNSEL:

MITCHELL H. TYNER
RONALD C. MORTON
WM. ROBERTS WILSON, JR., P.A.
654 NORTH STATE STREET
JACKSON, MISSISSIPPI 39202
(601) 948-1111

FRIELANDER, FRIELANDER, REIZES,
JOCH, & LITTMAN, P.C.
425 PARK AVENUE
WAVERLY, NEW YORK 14892

CERTIFICATE OF SERVICE

I, Wm. Roberts Wilson, Jr., a member of the bar of this Court, hereby certify that on this 19th day of October, 1992, three copies of the Petition for Writ of Certiorari in the above entitled case were mailed, first class postage prepaid, to J. Carter Thompson, Esq., Butler, Snow, O'Mara, Stevens & Cannada, 17th Floor, Deposit Guaranty Plaza, Post Office Box 22567, Jackson, Mississippi, 39225-2567, counsel for all the Respondents herein. I further certify that all parties required to be served have been served.

WM. ROBERTS WILSON, JR.
WM. ROBERTS WILSON, JR., P.A.
654 NORTH STATE STREET
JACKSON, MISSISSIPPI 39202
(601) 948-1111

APPENDIX A

Esther PRINCE,
Plaintiff,

v.

F. HOFFMAN-LA ROCHE & CO., L.C.
Hoffman-La Roche, Inc. and
Roche Biomedical Laboratories, Inc.,
Defendants.

Civ. A. No. S91-0174(R).

United States District Court,
S.D. Mississippi, S.D.

Sept. 26, 1991.

Pennsylvania citizen filed suit against Swiss pharmaceutical manufacturer, alleging that she sustained personal injuries as result of her purchase of manufacturer's drug in one country and ingestion of it in another country. Manufacturer moved to dismiss summons and complaint for insufficient service of process and lack of personal jurisdiction. The District Court, Dan M. Russell, Jr., J., held that: (1) nonresident plaintiff could not use "doing business" prong of long-arm statute to obtain in personam jurisdiction over nonresident defendant, and (2) assuming that it was otherwise available, repealed statute making nonresident corporations found to be doing business in Mississippi subject to suit there to the same extent as Mississippi corporations also did not provide basis for assertion of personal jurisdiction.

Motion granted.

Mitchell H. Tyner, William Roberts Wilson, Jr., P.A., Jackson, Miss., for plaintiff.

J. Carter Thompson, Jr., Butler, Snow, O'Mara, Stevens & Cannada, Jackson, Miss., for defendants.

MEMORANDUM ORDER

DAN M. RUSSELL, Jr., District Judge.

This cause is before this Court on a Motion by Defendant Hoffman-La Roche, Inc. (hereinafter "La Roche" to Dismiss the plaintiff's summons and complaint for insufficient service of process and lack of personal jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(2) and 12(b)(5).

FACTS

On April 19, 1991, the plaintiff, Esther Prince (hereinafter "Prince"), filed her complaint in this Court.

By her complaint, Prince alleges that she is a citizen of Pennsylvania and that the defendant, F. Hoffman-La Roche & Co., L.C., is a resident corporation of Switzerland; and the defendants, Hoffman-La Roche, Inc. and Roche Biomedical Laboratories, Inc., are resident corporations of New Jersey. The plaintiff further alleges that each defendant has its principal place of business in a state other than Pennsylvania.

In the complaint the plaintiff alleges that each of these defendants designed, manufactured, marketed, produced and distributed for resale to the general public a certain drug known as Fansidar for oral consumption.

The plaintiff alleges, relying upon the defendants' ex-

press and implied warranties that Fansidar was a safe prophylactic against malaria, that she purchased and ingested the drug resulting in disability.

Although the plaintiff maintains that these defendants were, al all times relevant, doing business in the State of Mississippi, she also alleges that she purchased the Fansidar in British Hong Kong and ingested it in the People's Republic of China from October, 1984 to July, 1985, and in the Commonwealth of Pennsylvania in August, 1985 and September, 1985.

Defendant Roche Biomedical Laboratories, Inc. moved for summary judgment, which motion was granted by this Court on June 27, 1991.

Defendant F. Hoffman-La Roche & Co., L.C., has apparently not been served with process as of the date of this Memorandum Order.

DISCUSSION

As it is uncontested that neither the plaintiff nor the defendant, La Roche, is a resident of the State of Mississippi, and that the defendant is not qualified to do business in Mississippi, the dispositive issue before this Court is whether this Court can obtain personal jurisdiction over La Roche.

Citing *Applewhite v. Metro Aviation, Inc.*, 875 F.2d 491 (5th Cir.1989), and *Williams v. Taylor Machinery, Inc.*, 529 So.2d 606 (Miss.1988), the defendant correctly asserts that in order for this Court to obtain personal jurisdiction over La Roche (1) there must be a Mississippi statute conferring such jurisdiction; and (2) the exercise of such jurisdiction must comport with the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

[1] The primary statute which is applicable herein is Mississippi's long-arm statute, Miss.Code Ann. § 13-3-57 (Supp.1991), which provides in pertinent part as follows:

> Any ... foreign or other corporation not qualified under the constitution and laws of this state as to doing business herein, who shall make a contract with a resident of this state to be performed in whole or in part by any party in this state, or who shall commit a tort in whole or in part in this state against a resident or nonresident of this state, or who shall do any business or perform any character of work or service in this state, shall by such act or acts be deemed to be doing business in Mississippi. Such act or acts shall be deemed equivalent to the appointment by such nonresident of the secretary of state of the State of Mississippi ... to be the true and lawful attorney or agent of such nonresident upon whom all lawful process may be served in any actions or proceeding accrued or accruing from such act or acts, or arising from or growing out of such contract or tort, or as an incident thereto, by any such nonresident or his, their or its agent, servant or employee.

As it is clear and uncontested that neither the "contract" nor the "tort" prongs of the long-arm statute are relevant to this cause, the only question is whether the "doing business" prong is available to this plaintiff.

Citing abundant authority, including *Smith v. DeWalt Products Corp.*, 743 F.2d 277 (5th Cir.1984), and *Goodman v. Hoffman-La Roche, Inc.*, C.A. No. J89-0649(B) (S.D.Miss. Jan. 9, 1990), both parties agree that the Fifth Circuit and the district courts of this state have consistently held that a non-resident plaintiff cannot use the "doing business" prong of the long-arm statute to obtain inpersonam jurisdiction over a non-resident defendant.

The argument of this plaintiff, which has been offered before to the courts of this district, is that the Mississippi Supreme Court in *Shewbrooks v. A.C. & S., Inc.*, 529 So.2d 557 (Miss.1988), indicated that non-resident plaintiffs are free to sue non-resident defendants under said "doing business" prong.

As recent as April 2, 1991, Judge Walter J. Gex, III stated in the consolidated case *Stanley Black, et al. v. Carey Canada, Inc., et al.*, C.A. No. S89-0470(G), slip op. at 5 (S.D.Miss. April 2, 1990), that "a non-resident plaintiff may not use the 'doing business' provision of the Mississippi long-arm statute."

Previously in *James B. Acker, et al. v. Armstrong World Industries, Inc., et al.*, C.A. No. S89-0563(L), slip op. at 9, 1989 WL 268344 (S.D.Miss. December 2, 1989), Judge Gex, citing to *Shover v. Cordis Corporation*, C.A. No. J89-0443(W) (October 25, 1989), set out:

> If the *Shewbrooks* court really intended the 'doing business' provision of the Mississippi long-arm statute to be made available to non-resident plaintiffs, this Court is confident they would have at least cited the statute somewhere in their opinion. Also, this Court is persuaded that if the Mississippi Supreme Court meant what plaintiffs contend they did, then that court would have cited the numerous federal court cases that have held otherwise, as having erred in their Erie guesses. Therefore, *Shewbrooks* did not change the prior rule that non-residents may not obtain service of process pursuant to the 'doing business' provision of the Mississippi long-arm statute. *Shover, supra*, at 3-4.

[2] The plaintiff also argues that even if this Court rejects a reading of *Shewbrooks* which would make the "doing business" prong available, this Court would have to accept *Shewbrooks* as authority for jurisdiction under Miss.Code Ann. § 79-1-27 (Supp.1986) (repealed effective Jan. 1, 1988), which provided that:

> Any corporation claiming existence under the laws of any other state or of any other country foreign to the United States, found doing business in this state, shall be subject to suit here to the same extent that corporations of this state are, whether the cause of action accrued in this state or not.

The defendant argues in part that as the civil action was not begun until after the subject statute was repealed, the plaintiff may not rely upon it notwithstanding the allegations that the cause of action accrued prior to the repeal.

This Court, without deciding, accepts *arguendo* that § 79-1-27 is otherwise available; however, this Court agrees with the court of appeals in *Smith v. DeWalt Products Corporation*, 743 F.2d 277 (5th Cir.1984), wherein it is summarized:

> First, the Mississippi Supreme Court has held that, in a situation such as this, Miss.Code Ann. § 79-1-27 (1972) and the long-arm statute must be construed together and harmonized. This court of course follows that construction of Mississippi law, but in the instant case, the only manner in which these two provisions can be harmonized is to refuse to extend personal jurisdiction over DeWalt. As already noted, when the

> Mississippi legislature amended the long-arm statute in 1980, it did not extend the 'doing business' provision of that statute to non-resident plaintiffs. To extend jurisdiction over DeWalt on the authority of § 79-1-27, therefore, would be completely contrary to the intent of the Mississippi legislature. (footnotes omitted).

Id. at 281.

This Court also finds support in *Schmid v. Roehm GmbH,* 617 F.Supp. 655 (D.C.Miss. 1985), wherein Judge William H. Barbour, Jr. set out:

> *Miss.Code Ann.* § 79-1-27 has not been construed to authorize the assertion of jurisdiction over suits brought by non-resident plaintiffs against non-qualified/non-resident corporations. *See Smith v. DeWalt,* 743 F.2d 277, 281 (5th Cir.1984). While a good deal of confusion has been generated by the Mississippi Supreme Court's statement that § 79-1-27 and the long arm statute must be construed together and harmonized, *see Arrow Foods Distributors, Inc. v. Love,* 361 So.2d 324, 377 (S.D.Miss. 1978), no court has yet interpreted that statement to mandate an enlargement of the jurisdiction authorized by the long arm statute. The Court of Appeals for the Fifth Circuit has recently certified a question to the Mississippi Supreme Court dealing with this issue, *see Manookian v. A.H. Robins Company, Inc.,* 760 F.2d 567 (5th Cir.1985), but Plaintiff incorrectly assumes that resolution of that question would be dispositive in the instant case.
>
> The question certified to the Mississippi Supreme Court in *Manookian* is 'whether a non-

> resident plaintiff asserting a cause of action based upon a tort which wholly occurred outside of the State of Mississippi can rely on *Miss.Code Ann.* § 79-1-27 (1972) to secure jurisdiction over a foreign corporation which *does business* in Mississippi but is exempt from the qualification requirements.' 760 F.2d at 567. (emphasis added). The issue thus framed presupposes that the corporation meets the 'doing business' provision of the statute. As hereinafter stated, the Defendants in the instant case are not doing business in Mississippi.

Id. at 657-658.

In both *DeWalt* and *Schmid, supra*, the courts were able to buttress their opinions with a separate finding that the defendants were not doing business; a finding which this Court declines to make at this time.

Having discovered that, due to factors not related to the issues certified, the Mississippi Supreme Court did not proceed to a determination of the question in *Manookian*, this Court nevertheless opines that it would be inconsistent to allow the non-resident plaintiff to use § 79-1-27 to achieve a result which the Mississippi legislature eschewed when it amended the long-arm statute in 1980.

Finding, as it does, that there is no statutory basis for this Court to assert personal jurisdiction over La Roche, this Court finds it unnecessary to consider the defendant's federal due process argument. *See Thompson v. Chrysler Motors Corp.*, 755 F.2d 1162 (5th Cir.1985), and *McDaniel v. Ritter*, 556 So.2d 303 (Miss.1989).

Finally, as this Court bases its decision wholly upon the inability of a non-resident plaintiff to sue a non-resident

defendant under the "doing business" prong of the long-arm statute, this opinion does not address the defendant's argument of insufficiency of service of process.

IT IS THEREFORE ORDERED AND ADJUDGED that the defendant's Motion to Dismiss is hereby GRANTED.

SO ORDERED AND ADJUDGED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

ESTHER PRINCE — PLAINTIFF

VERSUS — CIVIL ACTION NO. S91-0174(R)

F. HOFFMAN-LA ROCHE & CO., L.C.
HOFFMAN-LA ROCHE, INC. and ROCHE
BIOMEDICAL LABORATORIES, INC. DEFENDANTS

MEMORANDUM ORDER

This cause is before this Court on the plaintiff's Motion to Reconsider this Court's September 26, 1991 Memorandum Order dismissing the plaintiff's claim against Defendant Hoffman-La Roche, Inc. for lack of jurisdiction. Also before this Court is said defendant's Motion to Strike and Disregard Affidavits and Disregard Other Exhibits to Plaintiff's Motion for Reconsideration.

DISCUSSION

The plaintiff, Esther Prince, argues that the subsequent Motion to Reconsider is properly submitted pursuant to Fed.R.Civ.P. 59(e).

While duly noting the defendant's observation that the precise terminology of Rule 59(e) is "to alter or amend," this Court proceeds to the merits of the plaintiff's motion.

Judge William H. Barbour, Jr. in **Atkins v. Marathon LeTourneau Company**, 130 F.R.D. 625, 626 (S.D. Miss. 1990), set out as follows, to-wit:

> The Court here notes for purposes of clarification that it, as have other courts in the context of Rule 59(e) motions, recognizes only three possible grounds for any motion for reconsideration: (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, and (3) the need to correct a clear error of law or prevent manifest injustice. **Natural Resources Defense Council v. United States Envtl. Protection Agency**, 705 F.Supp. 698, 702 (D.D.C. 1989), **vacated on other grounds**, 707 F.Supp. 3 (D.D.C. 1989).

Since this Court's Memorandum Order of September 26, 1991, in the above styled civil action, there has not come to its attention any indication that the controlling law has been changed. Furthermore, notwithstanding the plaintiff's supplemental exhibits—whether or not properly submitted or admissible—the evidence which is relevant to this Court's prior decision has not substantially changed.

The sole basis of the plaintiff's Motion to Reconsider appears to be aimed at what she perceives to have been an error by this Court in the interpretation of Miss. Code Ann. Section 13-3-57 (1972 & Supp. 1991), in the wake of **Shewbrooks v. A.C. & S., Inc.**, 529 So. 2d 557 (Miss. 1988).

Having devoted no small increment of time and effort to the question of the non-resident plaintiff's right to use the "doing business" prong of the afore-cited Mississippi long-arm statute to effect jurisdiction by this court of a non-resident defendant, this Court stands by its original Order.

Finally, as pertains to the Motion to Reconsider, this court adopts the relevant language and authority of Judge Barbour speaking in **Liberty Mutual Ins. Co. v. Graves,**

C.A. No. J88-0535(B) (S.D. Miss. May 11, 1990), wherein he states the following, to-wit:

> With regard to the third ground [as enumerated in **Natural Resources, supra**] this Court is inclined to agree with the court in **Durkin v. Taylor,** 444 F.Supp. 879, 889 (E.D.Va. 1977), where the court stated that the proper recourse for a litigant who feels that the judgment of a court is based upon an erroneous view of the law is appeal, not re-argument.

Id. at 3.

In conclusion, regarding the defendant's Motion to Strike and Disregard the Plaintiff's Affidavits and Exhibits, having found these to be extraneous to this Court's decision on the underlying Motion, this Court finds said Motion to Strike and Disregard to be moot.

IT IS THEREFORE ORDERED AND ADJUDGED that the plaintiff's Motion to Reconsider is DENIED, and the defendant's motion is held to be moot.

SO ORDERED AND ADJUDGED this the 24th day of December, 1991.

/s/ Dan M. Russell, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7060
Summary Calendar

FILED
MAY 28 1992

ESTHER PRINCE,
Plaintiff-Appellant,

VERSUS

F. HOFFMAN-LA ROCHE & CO., L.C., et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA S91-0174(R)

Before JOLLY, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:*

This appeal presents the question of whether an out-of-

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* Local Rule 47.5.1 provides: "the publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

state plaintiff can utilize the "doing business" prong of Mississippi's long-arm statute to effect jurisdiction over a foreign defendant in Mississippi. The district court, on the basis of *Shewbrooks v. A.C. & S., Inc.*, 529 So. 2d 557 (Miss. 1988), dismissed the complaint for insufficient service of process and lack of personal jurisdiction. We affirm.

As the appellant, Esther Prince, concedes, every federal court that has considered this question has concluded that, in light of *Shewbrooks*, the above question of Mississippi law must be answered in the negative. Prior to the decision in *Shewbrooks*, we had held to the same effect in, e.g., *Smith v. DeWalt Prods. Corp.*, 743 F.2d 277, 279 (5th Cir. 1984).

Subsequently to the district court's judgment in the case *sub judice*, a panel of this court has reiterated the efficacy of *Smith*. In *Herrley v. Volkswagen of Am., Inc.*, 957 F.2d 216, 217 (5th Cir. 1992) (per curiam), we observed that "there has been no intervening change in Mississippi law since *Smith* was decided, [and therefore] our answer in this case is controlled by *Smith*." Bound by both *Smith* and *Herrley*, we AFFIRM the judgment of the district court.[1]

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[1] The appellant urges us to certify this question to the Mississippi Supreme Court. We decline to do so because of the well-established line of federal authority answering the question at hand. *See also Herrley*, 957 F.2d at 219 (declining to certify the same question because the Mississippi Supreme Court, despite a delay of approximately six years, failed to answer the question, after accepting the certificate, in *Manookian v. A.H. Robins Co.*, 755 F.2d 1125 (5th Cir. 1985)).

APPENDIX D

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

JULY 1, 1992

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

FILED
JUL -3 1992

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 92-7060 - Prince v. F. Hoffman-LaRoche
(D.C. No. CA S91-0174-R)

The following action has been taken in the above case:

☒ AN EXTENSION OF TIME has been granted to and including
*July 6, 1992

☐ for filing appellant's/petitioner's brief.

☐ for filing appellee's/respondent's brief.

☐ for filing reply brief.

☒ for filing petition for rehearing. (Appellant)

☐

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*MUST BE PHYSICALLY FILED IN OUR OFFICE BY DUE DATE.

☐ Motion to consolidate granted.

☐ Motion to supplement or correct the record granted.

☐ Motion for leave to file supplemental brief granted.

☐ Motion for leave to file brief *amicus curiae* is granted.

☐ Joint motion as to time for filing briefs granted.

☐ Order enclosed has been entered.

☐

GILBERT F. GANUCHEAU, Clerk

By: /s/ Jann Davis
Deputy Clerk

/jmd

cc: Mr. Mitchell Tyner
Mr. J. Carter Thompson

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 92-7060

FILED
JUL 21 1992

ESTHER PRINCE,

Plaintiff-Appellant,

versus

F. HOFFMAN-LA ROCHE & CO., L.C.,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Mississippi

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 05/28/92 , 5 Cir., 1992, ____F.2d____)

(July 21, 1992)

Before JOLLY, DAVIS and SMITH, Circuit Judges.

ENTERED FOR THE COURT:

/s/ J. Smith
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND
LOCAL RULES 41
FOR STAY OF
THE MANDATE

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.